LOOI KOW CHAI & ANOR

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ALAUDDIN MOHD SHERIFF JCA
RICHARD MALANJUM JCA
[CRIMINAL APPEAL NO: B-05-47-2000]
28 OCTOBER 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section s. 39B(1)(a) - Trafficking in heroin and monoacetylmorphines - Amendment of charge to s. 39A(2) by trial judge at close of prosecution case, whether proper - Whether accused should have been called to enter defence - Evaluation of evidence by trial judge, whether correct - Quantity and transportation of drugs - Conduct and demeanour of accused persons - Evidence of chemist - Prima facie case of trafficking, whether made out*

EVIDENCE: *Expert evidence - Evidence of chemist - Analysis of substances suspected to be dangerous drugs - Principles governing reception of chemist's evidence by court - Whether can be accepted at face value - Rebuttal evidence from another chemist and cross-examination - Whether chemist must give precise details of laboratory analysis conducted - Sufficiency of representative samples taken for analysis - Failure of chemist to state weight of representative samples analysed - Dangerous Drugs Act 1952*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section s. 39B(1)(a) - Trafficking in a dangerous drug - Evidence of chemist - Analysis of substances suspected to be dangerous drugs - Principles governing reception of chemist's evidence by court - Whether can be accepted at face value - Rebuttal evidence from another chemist and cross-examination - Whether chemist must give precise details of laboratory analysis conducted - Sufficiency of representative samples taken for analysis - Failure of chemist to state weight of representative samples analysed*

CRIMINAL PROCEDURE: *Prima facie case - Meaning of - Principles applicable - Whether judge sitting alone must conduct maximum evaluation of prosecution's evidence - Whether maximum evaluation means 'beyond reasonable doubt' - Whether judge must convict if accused remains silent at close of prosecution case - Whether minimal evaluation and two-tier test still applicable - Criminal Procedure Code (Revised 1999), s. 180*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Duty of trial judge - Whether judge sitting alone must conduct maximum evaluation of prosecution's evidence - Whether maximum evaluation means 'beyond reasonable doubt' - Whether judge must convict if accused remains silent at close of prosecution case - Whether minimal evaluation and two-tier test still applicable - Criminal Procedure Code (Revised 1999), s. 180*

The 1st and 2nd accused were charged in the High Court with trafficking in dangerous drugs (299.51g of heroin and 105.58g of monoacetylmorphines) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the case for the prosecution, the trial judge held that the charge of trafficking had **not** been made out and proceeded to amend the charge to one under s. 39A(2) of the DDA. Both the accused were subsequently convicted on the amended charge. The instant appeals before the Court of Appeal were: (1) by the 2nd accused against his conviction on the amended charge; and (2) by the prosecution against the decision of the trial judge to amend the original charge against the 2nd accused and to convict him on the reduced charge. With the consent of both parties, the prosecution's appeal was heard first because, if allowed, it would render the 2nd accused's appeal academic.

In submitting that the 2nd accused should have been called upon to enter on his defence on the original charge of trafficking, the prosecution contended that the trial judge had failed to consider (and draw the proper inferences from): (i) the quantity or weight of the dangerous drugs involved, which was 27 times greater than the statutory minimum required to activate the presumption of trafficking under s. 37(da)(iiia) of the DDA; (ii) the physical transportation of the dangerous drugs by the 2nd accused from another place to the scene of the incident; and (iii) the conduct or collaborative demeanour of the 1st and 2nd accused taken together, *eg*, the tacit removal of the bag containing the 20 packets of dangerous drugs by the 1st accused from the boot of the car driven by the 2nd accused.

On the other hand, the 2nd accused submitted that there were four fatal flaws pertaining to the chemical analysis of the substances undertaken by the chemist, *viz* that: (i) the samples taken by the chemist were insufficient; (ii) the chemist did not take at least three random representative samples from each packet of each substance; (iii) the chemist did not carry out any procedure to ascertain that the substance was sufficiently homogenised; and (iv) the chemist did not state the weight of the representative samples.

Held:
Per Gopal Sri Ram JCA

[1] The facts and circumstances in the instant appeals (relating to the chemical analysis of the substances undertaken by the chemist as well as his evidence in respect thereof given before the High Court) were readily distinguishable from those in the cases of *PP v. Ang Soon Huat* [1991] 1 MLJ 1 HC (Sing) and *Loo Kia Meng v. PP* [2000] 3 CLJ 653 CA. Unlike in the instant appeals, the chemist in *PP v. Ang Soon Huat* was subjected to rigorous cross-examination and his evidence was contradicted by rebuttal evidence from the chemist called by the defence. And, unlike in *Loo Kia Meng v. PP*, the chemist in the instant appeals had analysed the entire contents of the 20 packets of the seized substances (*ie*, **100%** and not only a percentage thereof). (pp 744 f-g & 745 d-g)

[1a] Where the opinion of a chemist is confined only to the elementary nature and identity of a substance, the court is entitled to accept the opinion of that chemist on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is **no** necessity for him to go into the details of what he did in the laboratory, step by step. (*Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250 SC and *PP v. Lam San* [1991] 3 CLJ 2410 SC followed.) (pp 744 h & 745 a-c)

[2] At the conclusion of its case, the prosecution had made out a *prima facie* case of trafficking against the 2nd accused. It had shown, *prima facie*, that the 2nd accused brought the dangerous drugs from another place to the scene of the incident, and that he either assisted or was involved, directly or indirectly, in conveying the drugs to the 1st accused. (*Ong Ah Chuan v. PP* [1981] 1 MLJ 64 PC (Sing) and *Chow Kok Keong v. PP* [1998] 2 CLJ 469 FC followed.) Had the trial judge applied the *'prima facie'* test as formulated in s. 180 of the Criminal Procedure Code (Revised 1999) at the close of the case for the prosecution, he would have called upon the 2nd accused to enter on his defence on the original charge of trafficking. (pp 743 a-c, 746 a-c, 748 f & 757 c)

[3] Under s. 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused. The judge has only **one** exercise to undertake; he must subject the evidence of the prosecution to a **maximum evaluation** and then ask himself this question: If I decide to call upon the accused to enter on his defence, and he elects to **remain**

silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no *prima facie* case has been made out, and the accused is entitled to an acquittal. (Subjecting the prosecution's evidence to a maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at that intermediate stage.) (pp 749 c, g-h, 751 d-e & 752 a-d)

[3a] Consequently, a judge is **not** to undertake an initial minimal evaluation of the prosecution's evidence (followed by a maximum re-evaluation if the accused elects to remain silent) under s. 180 of the Criminal Procedure Code (Revised 1999). The following cases were, to this extent, wrongly decided: *PP v. Krishna Rao Gurumurthi & Ors* [2000] 1 CLJ 446 HC; *PP v. Sukumaran Sudram* [1999] 4 CLJ 242 HC. Conversely, the following cases correctly state the law as it presently stands: *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215 HC; *PP v. Ong Cheng Heong* [1998] 4 CLJ 209 HC; *PP v. Saare Hama & Anor* [2001] 4 CLJ 475 HC. (pp 754 d-h, 755 a-h, 756 a-d & 757 a-b)

[Prosecution's appeal allowed; trial judge directed to call upon 2nd accused to enter on his defence on charge of trafficking.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh pertama dan kedua dituduh di Mahkamah Tinggi dengan kesalahan mengedar dadah berbahaya (299.51 gram heroin dan 105.58 gram monoacetylmorphines) di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan, hakim bicara memutuskan bahawa kesalahan mengedar gagal dibuktikan dan berikutnya beliau telah meminda pertuduhan kepada pertuduhan di bawah s. 39A(2) Akta. Kedua-dua tertuduh kemudian disabitkan atas pertuduhan terpinda. Rayuan-rayuan ke Mahkamah Rayuan ini adalah: (i) oleh tertuduh kedua terhadap sabitannya atas pertuduhan terpinda; dan (ii) oleh pendakwaan terhadap keputusan hakim bicara meminda pertuduhan asal terhadap tertuduh kedua dan mensabitkannya atas pertuduhan terpinda tersebut. Kedua-dua pihak bersetuju supaya rayuan pendakwaan didengar dahulu oleh kerana, jika dibenarkan, ianya akan menyebabkan rayuan tertuduh kedua menjadi akademik.

Dalam hujahnya bahawa tertuduh kedua harus dipanggil untuk membela diri atas pertuduhan asal mengedar dadah berbahaya, pendakwaan menegaskan bahawa hakim bicara telah gagal memberi pertimbangan kepada (serta menzahirkan inferens-inferens sepatutnya dari): (i) kuantiti atau berat dadah berbahaya yang terlibat, yang mana ianya 27 kali ganda melebihi had minima statutori bagi membangkitkan anggapan mengedar di bawah s. 37(da)(iiia) Akta;

(ii) pembawaan secara fizikal dadah berbahaya oleh tertuduh dari suatu tempat lain ke tempat insiden; dan (iii) perlakuan atau tingkah laku sekongkolan tertuduh pertama dan kedua, misalnya pengambilan termaklum beg mengandungi dadah berbahaya oleh tertuduh pertama dari boot kereta yang dipandu tertuduh kedua.

Tertuduh kedua, sebaliknya, berhujah bahawa terdapat empat kecacatan yang memudaratkan berkenaan analisa kimia ke atas dadah yang dibuat oleh ahli kimia, iaitu: (i) contoh yang diambil ahli kimia tidak mencukupi; (ii) ahli kimia gagal mengambil tiga contoh representatif dari setiap bungkus setiap dadah berkenaan; (iii) ahli kimia tidak menjalankan sebarang prosedur bagi menentukan bahawa dadah di'homogenize' secukupnya; dan (iv) berat contoh-contoh representatif tidak dinyatakan oleh ahli kimia.

Diputuskan
Oleh Gopal Sri Ram HMR

[1] Fakta dan halkeadaan rayuan-rayuan di sini (berkaitan analisa kimia yang dibuat ahli kimia ke atas dadah serta keterangan beliau berkenaan halperkara itu di Mahkamah Tinggi) dengan jelas boleh dibezakan dari fakta dan halkeadaan di dalam kes-kes *PP lwn. Ang Soon Huat* [1991] MLJ 1 HC (Sing) dan *Loo Kia Meng lwn. PP* [2000] 3 CLJ 653 CA. Berbeza dengan kes semasa, ahli kimia di dalam *PP lwn. Ang Soon Huat* telah dihadapkan kepada satu pemeriksaan balas yang rapi dan keterangannya telah disanggah oleh keterangan penepisan ahli kimia yang dipanggil oleh pembelaan. Dan, berbeza dengan *Loo Kia Meng lwn. PP*, ahli kimia di dalam rayuan-rayuan semasa ini telah menganalisa keseluruhan kandungan 20 bungkus dadah yang dirampas (iaitu 100% dan bukannya sebahagian darinya).

[1a] Di mana pendapat ahli kimia hanya terhad kepada identiti dan sifat asas dadah, mahkamah berhak untuk menerima pendapat pakar tersebut pada dasarnya, kecualilah jika ianya langsung tidak masuk akal atau jika pihak pembelaan memanggil keterangan penepisan oleh pakar lain yang menyanggah pendapat tersebut. Selagi ahli kimia tersebut memberikan keterangan yang dapat diterima bagi menyokong pendapatnya, tidak ada keperluan baginya untuk menceritakan secara terperinci, langkah demi langkah, apa yang beliau lakukan di makmal (*Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250 SC dan *PP lwn. Lam San* [1991] 3 CLJ 2410 SC diikuti).

[2] Di akhir kesnya, pendakwaan telah membuktikan suatu kes *prima facie* mengedar dadah terhadap tertuduh kedua. Secara *prima facie*, pendakwaan telah membuktikan bahawa tertuduh kedua telah membawa dadah berbahaya dari suatu tempat lain ke tempat berlakunya insiden, dan bahawa beliau juga telah turut membantu ataupun terlibat, sama ada secara langsung atau sebaliknya, dalam menghantar dadah kepada tertuduh pertama. (*Ong Ah Chuan lwn. PP* [1981] 1 MLJ 469 (Sing) dan *Chow Kok Keong lwn. PP* [1998] 2 CLJ 469 FC diikuti). Jika hakim bicara memakai ujian *'prima facie'* sebagaimana ianya tergubal di dalam s. 180 Kanun Prosedur Jenayah (Dikaji 1999) di akhir kes pendakwaan, beliau pastinya akan memanggil tertuduh kedua untuk membela diri atas pertuduhan asal mengedar dadah berbahaya.

[3] Di bawah s. 180 Kanun Prosedur Jenayah (Dikaji 1999), tanggungjawab seseorang hakim, yang bersidang secara sendirian, di akhir kes pendakwaan, adalah untuk menentukan, selaku pengadil fakta, sama ada pendakwaan berjaya membuktikan suatu kes *prima facie* terhadap tertuduh. Hakim hanya mempunyai satu pertimbangan untuk dibuat; beliau mestilah mentaklukkan keterangan pendakwaan kepada suatu penilaian maksima dan selepas itu menanya dirinya soalan ini: sekiranya aku memutuskan untuk memanggil tertuduh untuk membela diri, dan dia memilih untuk berdiam diri, adakah aku akan mensabitkannya berdasarkan keseluruhan keterangan yang dikemukakan oleh pendakwaan? Jika jawapannya negatif, maka tiada kes *prima facie* dibuktikan, dan tertuduh berhak untuk dibebaskan. (Mentaklukkan keterangan pendakwaan kepada penilaian maksima untuk menentukan sama ada pembelaan patut dipanggil tidak bermakna bahawa pendakwaan perlu membuktikan kesnya di luar keraguan munasabah di peringkat peralihan tersebut).

[3a] Ianya mengikut bahawa, seseorang hakim semestinyalah tidak boleh membuat suatu penilaian awalan minima terhadap keterangan-keterangan pihak pendakwaan (diikuti dengan penilaian maksima jika tertuduh memilih untuk berdiam diri) di bawah s. 180 Kanun Prosedur Jenayah (Dikaji 1999). Kes-kes berikut, sehubungan itu, adalah telah disalah putus: *PP lwn. Krishna Rao Gurumurthi & Ors* [2000] 1 CLJ 446 HC; *PP lwn. Sukumara Sudram* [1999 4 CLJ 242 HC. Sebaliknya, kes-kes berikut menyatakan kedudukan sebenar undang-undang semasa: *PP lwn. Dato' Seri Anwar Ibrahim* [1998] 4 CLJ 209 HC; *PP lwn. Saare Hama & Anor* [2001] 4 CLJ 475 HC.

Rayuan pendakwaan dibenarkan; hakim bicara diarah memanggil tertuduh kedua untuk membela diri atas pertuduhan mengedar.]

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 SC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 SC ***(foll)***
Cohen Lorraine Phillis & Anor v. PP [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 SC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 HC ***(foll)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Haw Tua Tau v. PP [1981] CLJ 123; [1981] CLJ (Rep) 11 PC ***(refd)***
Khoo Hi Chiang v. PP & Another Appeal [1994] 2 CLJ 151 SC ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(dist)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(foll)***
Murray v. Director of Public Prosecutions [1994] 1 WLR 1 ***(foll)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(foll)***
Pavone v. PP [1984] 1 MLJ 77 ***(refd)***
PP v. Ang Soon Huat [1991] 1 MLJ 1 HC ***(dist)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(foll)***
PP v. Kasmin Soeb [1974] 1 MLJ 230 ***(refd)***
PP v. Krishna Rao Gurumurthi & Ors [2000] 1 CLJ 446 HC ***(ovrd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(foll)***
PP v. Mohan Singh [1999] 4 CLJ 620 HC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(foll)***
PP v. Saare Hama & Anor [2001] 4 CLJ 475 HC ***(foll)***
PP v. Sukumaran Sudram [1999] 4 CLJ 242 HC ***(ovrd)***
Tai Chai Keh v. PP [1948-49] MLJ Supp 105 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 SC ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 173(f), 180(1)
Dangerous Drugs Act 1952, ss. 37(da)(iiia), 39A(2), 39B
Penal Code, ss. 34, 411

For the appellants - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Stanley Clement Augustin (Muhamad Iskandar Ahmad)

[Appeal from High Court, Shah Alam; Criminal Trial No: 47-11-1998]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA (judgment of the court):

There are two appeals before us. Both relate to the same subject matter. They arise out of the conviction of the appellant before us (the second accused in the court below) on a charge, amended by the court, under s. 39A(2) of the Dangerous Drugs Act 1952 ("the Act").

The Public Prosecutor has appealed, complaining that the conviction on the reduced charge under s.39A(2) was an error on the part of the court below. The second accused has appealed to us on the ground that he ought not to have been convicted of any offence whatsoever. To better understand these appeals regard must be had to the facts. We will now narrate them.

On the morning of 12 August 1997 Chief Inspector Fisol bin Salleh (PW4) received information that a transaction relating to dangerous drugs would be taking place later that same day at the Kentucky Fried Chicken outlet at Jalan Sulaiman, Kajang. PW4 then briefed a team of police officers. Later they all proceeded to the scene and laid an ambush. This was at about 2.45pm that day.

The police divided themselves into three teams. They were all in plain clothes. One of them took position inside the outlet. PW4 was in charge of this team. Another police officer, PW3, together with a second team took their position inside the car in which they had arrived at the scene. The third team placed itself in the vicinity of the outlet. A short while later a motorcycle arrived. It was ridden by the first accused in the court below. He is now dead. He died in prison after his conviction.

The first accused entered the outlet. A few minutes later he went out and was observed by the police to be making a telephone call on his hand-phone. A short while later a car arrived at the scene. It was a white Honda and bore Registration No. WAG 6341. The car in question stopped in front of an optometrist's shop. The second accused was driving the car. The first accused then walked to the car. He was seen speaking to the second accused. The first accused then went to the rear of the car and was observed by PW3 to remove something from the boot of the car. PW3 was quite certain in his evidence that the boot was open at the time. He saw the first accused removing a bag from it. The first accused then re-entered the outlet. He was then accosted and placed under arrest by PW4 and his team. The bag he was carrying was seized. It was found to contain two shirts, a newspaper and 20 packets of a pinkish substance which on later chemical analysis was found to be 299.51gm of heroin and 105.58gm of monoacetylmorphine. At about the same time that the first accused was placed under arrest, the second accused was also apprehended and the car seized. Investigation revealed that the second accused was the registered owner of the car. Both accused were later charged for trafficking in the aforesaid drug contrary to s. 39B of the Act.

Based on the primary facts narrated above, the learned trial judge at the close of the prosecution case held that a charge of trafficking had not been made out. He accordingly amended the charge and convicted both accused of an offence contrary to s. 39A(2) of the Act. It is against this decision that the appeals to which we referred to in the opening paragraphs of this judgment have been preferred to us.

We heard arguments in respect of both these appeals on 10 October 2002. Having carefully considered the record, we came to the conclusion that it would be most convenient if the Public Prosecutor opened this appeal. We took this course with the consent of the learned deputy and Mr. Gurbachan Singh of counsel for the second accused and because we formed the view that if the Public Prosecutor was right in his complaint, then the second accused's appeal would be rendered academic.

Accordingly we invited learned deputy to present his arguments in support of the Public Prosecutor's appeal. Encik Stanley Augustin, the learned deputy, argued that the judge had fallen into error in deciding as he did because he overlooked certain salient points in the prosecution's case and failed to have regard to the fair inferences that were to be drawn from the prosecution's evidence.

In support of his argument Encik Augustin drew our attention to three matters which, he said were either completely overlooked by the learned trial judge or not sufficiently considered by him. We will deal with each of these in turn.

The first concerns the weight of the drug in question. The drug involved in the present case was of a particularly large quantity. Its weight is 27 times greater than the statutory trigger provided by s. 37(da)(iiia). The point being made by the learned deputy is that people do not carry around such a large quantity of drugs unless there was intention to purvey it to someone else.

The second point is this. The drugs were physically transported from some other point to the scene of the incident. This act of transportation, argued the learned deputy, is evidence from which trafficking in the drugs may reasonably be inferred.

Third and last, it was submitted that the conduct of the now deceased first accused and the second accused when taken together pointed to both of them being involved in the offence of trafficking. We have, when narrating the facts, already set out in brief the conduct relied on by the learned deputy.

Take for example, the removal of the bag from the boot of the car. The totality of the evidence of the police officers taking part in the raid irresistibly points to the drugs being taken from the car of the second accused. Further, the act of removal of the bag by the first accused from the boot of the second accused's car produced no adverse reaction from the latter. The prosecution therefore says that this evidence denotes possession in its full legal sense in the second accused. Nobody would consent to something being removed from his car unless he wanted to transfer possession of that thing to the taker. Accordingly, the learned deputy submitted that when all these circumstances are marshalled and given their proper weight they reasonably support a case of trafficking.

While hearing the Public Prosecutor's appeal, we arrived at a very preliminary view on it. And this is what we then said in our address to Mr. Gurbachan Singh of counsel for the second accused.

> Based on *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 we have formed the preliminary view that on the facts narrated by the learned deputy, a *prima facie* case of trafficking by the instant appellant has been disclosed. This is because, in brief, the instant appellant brought the drugs from another place to the scene of the incident and either assisted or was involved directly or indirectly in conveying those drugs to another person namely the deceased appellant. That in our view, applying the common sense test formulated by Lord Diplock in *Ong Ah Chuan*'s case read with the judgment of Edgar Joseph Jr. FCJ in *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469 points to a case of trafficking. We therefore stop the learned deputy and call upon you Mr. Gurbachan Singh to address us as to why this court should not allow the Public Prosecutor's appeal and remit the case to the High Court to call for the defence of the appellant on a suitably amended charge that excises all references to section 34 of the Penal Code.

In the course of his arguments both in opposition to the Public Prosecutor's appeal and in support of the second accused's appeal, learned counsel raised a point about the chemist's evidence. It was a point on which we thought some material might be necessary, by way of decided cases. Accordingly at the joint request of both the learned deputy and learned counsel we adjourned further hearing of this appeal to this morning to enable both sides to turn up the authorities.

When the appeal came on for hearing this morning, learned counsel, Mr. Gurbachan Singh, eloquently directed his arguments at what he said were infirmities in the chemist's evidence. It is best we summarise his complaints. There are four of these. First that the samples taken by the chemist were insufficient. Second that the chemist should have taken at least 3 random representative samples of each packet of each drug. Thirdly the chemist did not conduct any test to see that the substance had been sufficiently homogenised. He should have carried out 3 runs of 5 minutes each of the blender to homogenise the substance. Fourthly, the chemist did not state the weight of the representative sample and this created a reasonable doubt in the case for the prosecution.

In support of these arguments learned counsel referred us to two authorities. The first of these is *Public Prosecutor v. Ang Soon Huat* [1991] 1 MLJ 1. It is the judgment of Chan Sek Keong J, a judge whose views are entitled to great respect. In *Ang Soon Huat*, the defendant was charged for trafficking in 18.77 gm of diamorphine. The chemist who gave evidence was subjected to careful and rigorous cross-examination. From a reading of the report of that

case, it appears that he made some very important concessions that impressed the trial judges in that case. Additionally that defendant in that case called the evidence of his own chemist in rebuttal. The cumulative evidence produced before the court showed that the chemist was not up to the mark. Hence the following comment by Chan Sek Keong J at p. 9 of the report:

> For the above reasons, we accept the general criticism that the laboratory procedures prevailing at the time the tests were done on the exhibit were not sufficiently rigorous in terms of the standards required of scientific analysis of drugs. We are constrained to agree with this criticism not only because the highest standards of laboratory practice should be followed at all times in respect of any analysis, whatever its purpose may be, but particularly on an occasion when, the result of the analysis was literally a matter of life and death for the accused.

In that state of the evidence the court came to the following conclusion:

> In the circumstances of the present case, we have decided that the proper course for this court to take is not to accept the suggestion of counsel for the accused as it lacks both logic and rationality, but to apply the principle that where the court is, on the evidence, left in doubt as to whether the accused has committed an offence in a lower or a higher degree of seriousness, the court should make a finding in the lower degree, particularly in a case in which a finding in a higher degree will give rise to a mandatory sentence of death. Accordingly, we find the accused guilty of trafficking in not less than 10 g and not more than 15 g of heroin at the time and date stated in the charge. We convict him accordingly.

In our view *Ang Soon Huat* is readily distinguishable from the present case. There the chemist, apart from being subjected to searching cross examination, was also contradicted by rebuttal evidence. Nothing of that sort happened here. As such we think that the present case comes within the principle governing the appreciation of such evidence as enunciated by Mohd Azmi SCJ in *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; ([1987] CLJ (Rep) 221). It is an approach which has been affirmed and reaffirmed by our apex court in later cases. Thus in *Public Prosecutor v. Lam San* [1991] 3 CLJ 2410; ([1991] 1 CLJ (Rep) 391) Hashim Yeop Sani CJ Malaya, one of our most distinguished judges said at p. 2412 (p. 394):

> As to how a trial court should approach the evidence of a chemist, we wish to advert to the judgment of this court in *Munusamy Vengadasalam v. PP* where in a passage at p. 256 (p. 226), Mohamed Azmi SCJ on behalf of the court put in focus the function of the chemist in a trial of this nature:

> We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of a substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

> Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as *prima facie* evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

See also *Khoo Hi Chiang v. Public Prosecutor & Another Appeal* [1994] 2 CLJ 151 at p. 158.

Based on these authorities we find no merit in the first three complaints made of the chemist's evidence by the second accused. None of the complaints now made were put to the chemist and neither was there any rebuttal evidence called.

As regards the fourth complaint, learned counsel relied on the judgment of this court in *Loo Kia Meng v. Public Prosecutor* [2000] 3 CLJ 653. It was there held that the failure by the chemist to state the precise weight of the sample or samples taken by him from a particular drug is unsatisfactory and would have the effect of creating a reasonable doubt in the accused's favour. We are entirely in agreement with the decision in that case. Indeed we have been informed by Mr. Gurbachan Singh who was counsel in *Loo Kia Meng* that an appeal in that case by the Public Prosecutor to the Federal Court failed.

The judgment of this court on that occasion was delivered by Shaik Daud JCA a judge with vast experience on the subject of drug trafficking and whose views are entitled to much weight. But the present case is a long way away from *Loo Kia Meng*. For, here the chemist said as follows:

> I am aware of the percentage required for analysis under s.37(j) of DDA. In this case I had analysed the entire 20 packets – ie, 100%.

Since the analysis here was 100% that is to say the whole quantity of the drug, no question arises from the failure to take representative samples by weight.

We would also add that in response to our learned brother Richard Malanjum JCA learned counsel for the second accused frankly conceded that the word "weight" appearing in the Act included calculated weight ie, the weight calculated by the chemist.

Having considered the evidence led by the prosecution up to the close of its case, we are in agreement with the learned deputy that this is a proper case in which the defence upon the original charge of trafficking should have been called. In arriving at this conclusion, we would hasten to add that what we have said thus far is not to be construed as a direction to the learned judge to convict. We merely say that the defence should have been called on the charge as originally framed by the Public Prosecutor.

We further agree with the learned deputy before us that if the common sense approach set out by Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 had been adopted by the learned judge it would have resulted in the defence being called on the original charge. We remind ourselves of what the learned Law Lord said in that case (at p. 69):

> So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorized by the Act or Regulations, involves an offence of having the drug in one's possession under section 6 but does not amount to the offence of trafficking under section 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of section 10 of the Drugs Act and section 3(c) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under section 3; since they provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under section 29 and the Second Schedule.
>
> This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 39(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under section 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.

Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

Now, we are well aware that the Privy Council was there dealing with the Misuse of Drugs Act 1973 Singapore. At one point in time our courts thought that Singapore decisions on their statute was of little value here because of the differences in the two statutory provisions, namely ours and theirs. For example, it was thought that while in Singapore travelling about from one place to another with a small quantity of drug for personal consumption was not trafficking, in our jurisdiction it was. See *Teh Geok Hock v. Public Prosecutor* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC. However, that misconception was exploded by the decision of the Supreme Court in *Cohen Lorraine Phillis & Anor v. Public Prosecutor* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18. This resulted in the Federal Court in *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469 stating as follows:

In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s. 39B of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as oversimplistic. We would add that apart from the general consideration that the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject, in accordance with long established canons of construction, it is pertinent to note that the definition of 'trafficking' aforesaid comes under s. 2 of the Act, the very first line of which reads:

> In this Act, **unless the context otherwise requires** … .

In our view the context of s. 37(da)(i) which says:

> any person who is found in possession of; …
>
> (i) 15 grammes or more in weight of heroin; … otherwise than in accordance with the authority of this Act or any other written law, **shall be presumed, until the contrary is proved, to be trafficking in the said drug**;

does **'otherwise require'** (emphasis added). If this were not so, the provisions of s. 37(da) which specifically confer upon the accused the right to rebut the presumption of trafficking arising from being found in possession of dangerous drugs in excess of the statutory minimum, would be an empty hypocrisy.

It is noteworthy that the judgment of the Federal Court on that occasion was delivered by Edgar Joseph Jr FCJ, a judge of great learning and experience in all areas of the law.

If the learned judge in the present case had applied the test formulated in s. 180 of the Criminal Procedure Code after its amendment in 1997, we are of the view that he would have found a *prima facie* case on the original charge.

The phrase "would if unrebutted warrant his conviction" has been replaced by the phrase "*prima facie* case". There is no doubt whatsoever that the change in language was intended by Parliament to produce a change in consequence. But what does *"prima facie"* case mean? Or more importantly what did Parliament intend it to mean?

In our judgment Parliament by the phrase *"prima facie"* case intended to reverse the majority of the Federal Court in *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 and to statutorily codify the minority view in that case. The majority view in *Arulpragasan* was in the main a criticism directed at the opinion expressed by Lord Diplock in *Haw Tua Tau v. Public*

Prosecutor [1981] CLJ 123; [1981] CLJ (Rep) 11. In *Haw Tua Tau* Lord Diplock appears to have equated trials before a judge and jury to trials before a judge sitting alone.

Now, in a trial by judge sitting with a jury, the judge is the decider of law but the jury is the decider of fact. Quite the contrary in trials before a judge sitting alone. In the latter the judge is both decider of fact and law. We therefore find ourselves in agreement with the majority in *Arulpragasan* (speaking through his Lordship Justice Edgar Joseph Jr, FCJ) that it is absurd in the context of our jurisdiction to equate the two situations.

There is nothing in the amended s. 180 of the Criminal Procedure Code which reflects an intention in Parliament to create such an equation. Accordingly, in our judgment, under s. 180 as presently constructed it is the duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution has made out a *prima facie* case.

Returning to *Arulpragasan* the majority in that case held that the prosecution had to establish the charge against the accused beyond a reasonable doubt at the close of the prosecution case. This is the view that found disfavour in the minority led by Mohd Azmi FCJ. This comes across in the following passage in the judgment of his Lordship at pp. 617-618:

> Based on the reasoning of the Supreme Court, the Federal Court in *Tan Boon Kean v. PP* [1995] 4 CLJ 456 found considerable difficulty in accepting the pronouncement as purporting to abolish the two-tier stage of criminal trial by a single judge, hitherto recognized and embedded in our adversarial justice system, and it concluded that such suggestion (if any) in the pronouncement requiring the court to make a finding on a beyond reasonable doubt basis on the guilt of the accused at that particular stage of the trial was *obiter dicta*. *Tan Boon Kean* further held that the object of the maximum evaluation of the evidence by the court at the close of the prosecution case was to determine whether the prosecution had made out a *prima facie* case before the court could call the accused to enter his defence … (emphasis added.)

We find that a careful reading of the majority view and the minority view respectively in *Arulpagasan* in reality and for all practical purposes produces the same result. According to the majority if at the close of the prosecution case two or more inferences may be drawn from the prosecution evidence then the inference most favourable to the accused must be drawn. In that event the prosecution would not have proved its case because there would be a reasonable doubt. That is indeed, the position in law.

Thus in *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105 the Malayan Court of Appeal speaking through Spenser Wilkinson J said (at p. 108):

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

An illustration of this principle is to be found in the case of *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 MLJ 230. In that case the accused was charged under an alternative charge for having committed an offence under s. 411 of the Penal Code. According to the prosecution, the accused had dishonestly retained stolen property, to wit, a Honda generator, knowing or having reason to believe the same to be stolen property. The only evidence adduced connecting the accused to the crime was the fact that three days after the theft he led the police to a place from where the generator was recovered. At the close of the prosecution's case the magistrate acquitted the accused. The prosecution then appealed. The High Court dismissed the appeal. Mohd Azmi J (as he then was) when delivering his oral judgment said this:

> As far as leading the police to the place of discovery was concerned, there were at least two inferences that could be drawn in the absence of information given by the accused. Either the accused himself had hidden the stolen property there or he had come to know of its whereabouts through a third person. In a criminal case, the inference favourable to the accused should be drawn. Under the circumstances, the appeal is dismissed and the order of discharge and acquittal be affirmed.

It is noteworthy that *Kasmin bin Soeb* was decided at a time when s. 173(f) of the Criminal Procedure Code was in its un-amended form and hence contained the expression "would if unrebutted warrant his conviction". The exercise in which s. 180 was amended also resulted in an amendment to s. 173 (f) which now uses the phrase "*prima facie* case".

It is also clear from the judgment of Edgar Joseph Jr FCJ in *Arulpragasan* that what the majority was supporting was a maximum evaluation of the prosecution evidence. This is made clear in the following passage in the judgment of that very learned judge at p. 647 of the report:

> Furthermore, if the onus on the prosecution at the close of its case, is to establish a 'mere *prima facie* case', the test to be applied is a minimal evaluation of the prosecution's evidence to ensure that it is not inherently incredible (see *Haw Tua Tau v. PP*). Whereas, if the onus on the prosecution at the close of its case, is to establish a case 'beyond all reasonable doubt', then the test to be applied to the prosecution's evidence is **a maximum evaluation of the prosecution's evidence**, which calls for 'a more rigorous

> test of credibility' (per Lord Diplock in *Haw Tua Tau* at p. 54G), in order to answer the question: if there is no more evidence, has the prosecution proved its case beyond all reasonable doubt? (See *PP v. Fong Ah Tong & Anor* [1940] MLJ 240). (emphasis added.)

This is the same proposition that was laid down in *Khoo Hi Chiang (supra)* at p. 172:

> Consequently, the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible – the *Haw Tua Tau* test – but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

It would appear that a comparison between the passage earlier quoted from the minority judgment of Mohd Azmi FCJ and that of Edgar Joseph Jr. FCJ, reveals no serious difference of opinion between them as to the rigour with which the prosecution's evidence is to be examined. Hence, it is our respectful view that the difference of opinion, if any – and we hasten to add that we are unable to see any – between the majority and minority in Arulpragasan is not one of substance but of mere form. Both the majority and minority insist on a maximum evaluation of the prosecution evidence at the close of the prosecution's case. If there are gaps in the evidence (see *Abdullah Zawawi Omar v. Public Prosecutor* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19) or the evidence admits of more than one inference (*Kasmin bin Soeb supra*) then, applying either the view of the majority or the minority in *Arulpragasan*, the result would be the same in that the accused would be entitled to an acquittal at the close of the prosecution's case.

In our respectful view the correct test to be applied in determining whether a *prima facie* case has been made out under s. 180 of the Criminal Procedure Code (and this would apply to a trial under s. 173 of the Code) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 1 CLJ 138; ([1983] CLJ (Rep) 721) HC p. 152 (p. 752 g):

> To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to so even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of section 302 read with section 34 of the Penal Code? My answer to the question is in the negative.

We are confident in the view we have just expressed because we find nothing in the amended s. 180(1) of the Criminal Procedure Code that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s. 180 when an accused elects to remain silent as happened in *Pavone v. Public Prosecutor* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s. 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.

It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

Support for the view we have expressed may be found in the case of *Murray v. Director of Public Prosecutions* [1994] 1 WLR 1. That was a case of attempted murder and possession of a firearm with intent to endanger life which was tried before a judge sitting alone. Lord Slynn of Hadley there said (at p. 11):

> The accused cannot be compelled to give evidence but he must risk the consequences if he does not do so. Those consequences are not simply, as the defendant contends, that specific inferences may be drawn from specific facts. They include in a proper case the drawing of an inference that the accused is guilty of the events with which he is charged.
>
> This does not mean that the court can conclude simply because the accused does not give evidence that he is guilty. In the first place the prosecutor must establish a *prima facie* case – a case for him to answer. In the second place in determining whether the accused is guilty the judge or jury can draw only 'such inferences from the refusal as appear proper.' As Lord Diplock said in *Haw Tua Tau v. Public Prosecutor* [1982] AC 136, 153:
>
> > What inferences are proper to be drawn from an accused's refusal to give evidence depend upon the circumstances of the particular case, and is a question to be decided by applying ordinary common sense.

> There must thus be some basis derived from the circumstances which justify the inference. If there is no *prima facie* case shown by the prosecution there is no case to answer. Equally, **if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt.**
>
> On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty. (emphasis added.)

We have thus far stated our views on what is meant by the expression "*prima facie* case" appearing in ss. 173(f) and 180 of the Code. We now turn to examine cases decided since the amendments made in 1997 to those sections.

In *Public Prosecutor v. Krishna Rao a/l Gurumurthi & Ors* [2000] 1 CLJ 446 at p. 481 Kang Hwee Gee J expressed his view on the effect of the amendment to ss. 173(f) and 180 of the Criminal Procedure Code as follows:

> The first accused elected to remain silent and not to call any evidence. Following the Federal Court case of *Arulpragasan v. PP* [1997] 1 MLJ 389, I would be duty-bound to convict the first accused forthwith. But the decision in *Arulpragasan* is now no longer good law as s. 180 Criminal Procedure Code has since been thoroughly overhauled.
>
> In its present form however, the law is somewhat unsettled as to the next course of action that would have to be taken when an accused elects to remain silent. While requiring that the defence must be called at the close of the case for the prosecution if the court finds that a *prima facie* case has been made out, the phrase in the former state 'if unrebutted would warrant his conviction' has been conspicuously left out thereby opening again to interpretation the perennial question of whether the court can convict forthwith an accused who chooses to remain silent after being called to enter his defence. As I understand it, the *Arulpragasan* case seeks to explain that a '*prima facie* case' in the context of the requirement of the former s. 180 of the Criminal Procedure Code which contained the phrase 'which unrebutted would warrant his conviction' means simply, sufficiency of evidence at the close of the case for the prosecution. Hence, by reason of the existence of this phrase, it was clear that the prosecution must prove its case beyond reasonable doubt at the close of the case for the prosecution so as to put itself in a position to convict the accused if he chooses not to call any evidence (that is to say if he chose to remain silent) after being called to enter his defence. There would be no further need of re-evaluation of evidence – conviction must follow as matter of course.

> With the demise of *Arulpragasan*, personally I am of the view that one may depart from the position adopted in that case to convict an accused who chooses to remain silent forthwith at the close of the case for the prosecution – to re-examine the prosecution's evidence afresh to see if in the final analysis the charge against the accused has been proved beyond reasonable doubt. For in my considered view, s. 180 in its present form (without the phrase 'if unrebutted would warrant his conviction') merely requires the court to decide whether the prosecution has made out a *prima facie* case at the close of its case. All that the judge needs to do at this stage is to consider whether on the facts presented before him, there is sufficient evidence to merit the hearing of the defence side of the story. If there is not, the accused would be entitled to an acquittal without having to be called to enter his defence. If on the other hand there is sufficient evidence, the accused would have to be called to enter his defence – and in the event that the accused decides to remain silent it would be incumbent upon the judge to re-evaluate the prosecution's evidence this time with a view to deciding whether the prosecution has proved its case (as it was obliged to under the law) beyond reasonable doubt.

We have already expressed our view that neither s. 173(f) nor 180 calls for a minimal evaluation. In fact they require quite the opposite. They call for a maximum evaluation of the prosecution's evidence. As such, we must dissent from the view expressed by Kang Hwee Gee J in the above quoted passage and hold that view to be wrong in law.

In *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215 at pp. 274-275, Augustine Paul J made the following observation which has since received approval *sub silentio* from the Federal Court (see, [2002] 3 CLJ 457):

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasise and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.

In *Public Prosecutor v. Sukumaran a/l Sudram* [1999] 4 CLJ 242 at p. 256, Jeffrey Tan J expressed a view not wholly dissimilar from that expressed by Kang Hwee Gee J in *Public Prosecutor v. Krishna Rao a/l Gurumurthi & Ors (supra)*:

> A '*prima facie* case' is built on *prima facie* evidence. And since the standard of proof of a *prima facie* case is mere *prima facie* evidence, whereas the very purpose of a maximum evaluation of the prosecution evidence at the close of the case for the prosecution is to find a 'beyond reasonable doubt case' at the close of the case for the prosecution, **a maximum evaluation of the prosecution evidence at the stage of the close of the case for the prosecution is totally uncalled for.** In fact, a maximum evaluation is anathema to the concept of a *prima facie* case. (emphasis added.)

For the reasons we have already given, we are unable to agree with the view of the learned judge in the above quoted passage. In our opinion, it is not a correct statement of the law.

In *Public Prosecutor v. Ong Cheng Heong* [1998] 4 CLJ 209 at pp. 224-225, Vincent Ng J expressed his view on the amendment to s. 180:

> Thus, to me, maximum evaluation simply means evaluation, on a *prima facie* basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led rather than the persuasive burden in terms of qualitative degree of proof.
>
> What then constitutes a '*prima facie* case'? '*Prima facie'* means on the face of it or at first glance. To me, in the light of Act A979, perhaps the most appropriate definition of a '*prima facie* case' could be found in the *Oxford Companion of Law* (p. 987), which has it as:
>
> > A case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, **but is not conclusive**. (emphasis added.)
>
> It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected.

The same learned judge in *Public Prosecutor v. Saare Hama & Anor* [2001] 4 CLJ 475 at pp. 483-484 said:

> In my view the prosecution could be ruled to have 'made out a *prima facie* case against the accused' when the probative force of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore wrong for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and – to reiterate – there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. In substance, this is what Gordon Smith Ag JA held in *PP v. Chin Yoke* [1940] MLJ 47.

Although we might have expressed the test in different words, we agree with the formulation of the test in *Ong Cheng Heong* and *Saare Hama*. In our judgment, these two cases accurately set out the approach that is to be adopted under ss. 173(f) and 180 of the Code at the conclusion of the prosecution's case.

Lastly, in *Public Prosecutor v. Mohan Singh* [1999] 4 CLJ 620, Wahab Patail J expressed his view upon the approach to be taken by a court when deciding whether the prosecution had made out a case under s. 180 of the Code. He said:

> I conclude then that the prosecution must be in a position to say:
>
> a) at the end of the prosecution case, that on the basis of the evidence it has advanced, and tested by cross-examination, it has advanced evidence beyond reasonable doubt in respect of all the elements of the charge;and
>
> b) at the end of the trial, and based upon an evaluation of the whole of the evidence, that the defence has not raised any reasonable doubts by the evidence that the latter has adduced.
>
> Keeping in mind that in the event of ambiguity the beneficial interpretation is given in favour of the accused, the 'beyond reasonable doubt' test is therefore applied in assessing the evidence for the purpose of determining whether the prosecution has made out a *prima facie* case. It goes without saying that an evaluation of whether the prosecution has discharged the burden of proof beyond reasonable doubt requires a full or maximum evaluation of the evidence in the sense of evaluating the evidence before the court thoroughly.

If this passage is meant to suggest that the evidence led by the prosecution must receive maximum evaluation, then we would agree with it. But if what is meant is that a court ought to go further and determine whether the prosecution at the end of its case has proved the case against the accused beyond a reasonable doubt, then we find ourselves in disagreement with the learned judge in that case. In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage.

Returning to the present case and applying the test which we have earlier formulated, the learned judge was obliged to call upon the second accused to enter his defence on the original charge.

We once again would emphasise that all that we have said in respect of the material placed before the court below by the prosecution, is not intended and is not to be taken as a direction to the learned judge to convict the second accused on any charge. It is for him to undertake the usual exercise to evaluate the evidence at the close of the whole case and to come to a conclusion warranted by that evidence.

There is one other matter. The original charge was against both accused under s. 39B of the Act read with s. 34 of the Penal Code. Since the first accused is now deceased, the reference to s. 34 can no longer form part of the charge. At this stage it is for the prosecution to formulate the appropriate charge upon which the second accused's defence is to be called. We would therefore invite the learned Deputy Public Prosecutor to tender to us the charge upon which the second accused's defence is to be called.

Before we conclude this judgment we would like to covey our gratitude and appreciation to the learned counsel for the second accused and both the learned deputies who appeared before us. But for their effort and careful argument and the citation of relevant authorities this *ex-tempore* judgment would not have been possible.